

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

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THERSIA J. KNAPIK

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VS

)

CASE NO: 5:12-CV-175

MARY HITCHCOCK MEMORIAL  
HOSPITAL

)

\_\_\_\_\_)

MOTION FOR SUMMARY JUDGMENT  
HEARING

BEFORE: HONORABLE GEOFFREY W. CRAWFORD  
DISTRICT JUDGE

APPEARANCES: ANTHONY Z. ROISMAN, ESQUIRE  
NORMAN E. WATTS, JR., ESQUIRE  
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DATE: January 7, 2015

TRANSCRIBED BY: Anne Marie Henry, RPR  
Official Court Stenographer  
P.O. Box 1932  
Brattleboro, Vermont 05302

1 (The Court opened at 1:30 p.m.)

2 THE CLERK: Your Honor, the matter before the  
3 Court is civil number 12-175, Thersia Knapik versus Mary  
4 Hitchcock Memorial Hospital. Present on behalf of the  
5 plaintiff are Anthony Roisman and Norman Watts, Junior.  
6 Present on behalf of the defendant are Edward Kaplan and  
7 William Pandolph. And Steve Ellis is also present for the  
8 intervenor. And we are here for a hearing on a motion for  
9 summary judgment.

10 THE COURT: All right. Just preliminarily,  
11 Mr. Ellis, good to see you like always. I don't know quite  
12 what to do with you here. I know there was a kerfuffle  
13 about notice, but you kind of outsmarted yourself by getting  
14 everything sealed so nobody in the clerk's office really  
15 knows that you exist.

16 And then I went back and looked at the record and  
17 I read several very stern letters indicating that your  
18 client's beyond the jurisdiction of the Court and you have  
19 no part in the lawsuit.

20 So I respect your legal position, of course. So I  
21 don't really know what you want to do. You are welcome to  
22 come. If we were to fast forward, and in the event that we  
23 had a trial, I wouldn't have you seated where you are.  
24 You'd be with the public like everybody else.

25 MR. ELLIS: Would you like me to --

1           THE COURT: And if you don't -- no, no, you are  
2 totally fine here of course. If you don't come I won't be  
3 hurt, but if you, I suppose you should file a limited  
4 appearance, if you haven't already, if you want to get  
5 notice of hearings because everything got locked up under  
6 the ruling of Judge Reiss and literally we don't know that  
7 you really exist.

8           MR. ELLIS: Well, Your Honor, I do get electronic  
9 notice.

10          THE COURT: You do? Oh, so you knew that the  
11 hearing was coming?

12          MR. ELLIS: Oh, yeah.

13          THE COURT: I misunderstood. I thought you didn't  
14 get it.

15          MR. ELLIS: No. No. No.

16          THE COURT: All right.

17          MR. ELLIS: On the ECF System I get notice like  
18 everybody else. I'm here in whatever capacity I'm required  
19 to be here.

20          THE COURT: Perfect. Then we're fine. I thought,  
21 just to sort of complete the loop, I'm totally happy to  
22 honor Judge Reiss' sealing order. If the matter went to  
23 trial and if your client testified I would expect her to  
24 come in under her own name just like any other witness. You  
25 understand that?

1 MR. ELLIS: Yes.

2 THE COURT: Okay. We don't need to go there.

3 So why don't we turn to the summary judgment and  
4 the moving party. Good to see you.

5 MR. PANDOLPH: May I?

6 THE COURT: Please.

7 MR. PANDOLPH: William Pandolph for the defendant.  
8 The hospital has moved for summary judgment on two grounds.  
9 First, that Dr. Knapik failed to exhaust her administrative  
10 remedies by not filing for a grievance and having an  
11 evidentiary hearing on her dismissal. That Dr. Knapik knew  
12 that she could file the grievance and have a hearing, but  
13 she knowingly and intentionally declined to do so after  
14 consultation with counsel, and as we'll discuss, for reasons  
15 that do not excuse her failure.

16 If that were not enough, the decision to dismiss  
17 Dr. Knapik from the residency program for sending a  
18 confidential and privileged letter about another resident to  
19 that resident's fellowship program without permission, and  
20 in a manner designed to make it appear that it was an  
21 official communication from the residency program, was not  
22 arbitrary and capricious.

23 In other words, a reasonable residency program  
24 could have determined that Dr. Knapik engaged in conduct  
25 that was unbecoming of a physician and in violation of the

1 residency program's ethical standards. After all, Dr.  
2 Knapik admits sending the letter and taking the action that  
3 she was dismissed from the program for doing.

4 Also, as you may have noticed, Dr. Knapik has not  
5 argued that the hospital's determination was arbitrary and  
6 capricious. That argument was not made in response to her  
7 motion for summary judgment.

8 Instead, she relies, merely argues that it's the  
9 wrong standard, end of story. So to the extent that the  
10 Court agrees with us and determines that this standard is  
11 arbitrary and capricious we maintain that she has waived  
12 that argument.

13 I'm going to expand on those arguments in some  
14 detail, but I just wanted to spend a little time with a  
15 brief overview of the essential facts if that's okay.

16 Dr. Knapik was a medical resident in the  
17 hospital's general surgery residency program. As the Court  
18 has recognized, the primary purpose of the residency program  
19 is not employment, it's not the stipend, but rather, it's  
20 academic training and the academic certification of the  
21 completion of the program.

22 THE COURT: Right. I mean the thing barely  
23 squeaks past the 13th Amendment, right?

24 MR. PANDOLPH: What's that?

25 THE COURT: The thing barely squeaks past the 13th

1 Amendment. In other words, they work all the time and they  
2 get paid nothing, but they learn a lot.

3 MR. PANDOLPH: Fair enough. But how does one earn  
4 that certification? Well, if you look at the policies and  
5 procedures manual, of course, it involves medical knowledge  
6 and patient care, but also involves other things like  
7 professionalism, interpersonal communication skills.  
8 Professionalism includes integrity, respect for others,  
9 commitment to ethical principles, accountability to the  
10 profession. The point is, it's not simply about patient  
11 care and medical knowledge.

12 THE COURT: Right.

13 MR. PANDOLPH: So Dr. Knapik started in June,  
14 2007. And the resident who we refer to here is Dr. Doe and  
15 also Dr. Isak Goodwin who I'll talk about.

16 THE COURT: Doctor who?

17 MR. PANDOLPH: Isak Goodwin. It's I-S-A-K. Also  
18 began their general surgery residency program at the same  
19 time, in June, 2007.

20 Now, the expected duration of the general surgery  
21 residency program is five years, but despite that the  
22 residents enter into annual agreements of appointments. And  
23 you'll see in the file that Dr. Knapik did so for five  
24 years.

25 The agreements also incorporate the existing

1 policies and procedures of the residency program which  
2 include a number of important things. First, the residency  
3 program's code of ethical conduct. Second, the statement  
4 that you will be evaluated and that those evaluations are  
5 confidential and privileged, as the Court has already ruled.

6 Third, there are provisions about the confidential  
7 reporting of issues and concerns that a resident might have,  
8 the internal confidential reporting of concerns. And, in  
9 fact, you'll see that the policy manual says there will be  
10 no retribution for asking questions or making a good faith  
11 report of improper or questionable conduct.

12 And, finally, the policies and procedures also  
13 include a grievance policy, which we will discuss.

14 If I can jump ahead from the beginning of the  
15 program to 2011. In early 2011 Dr. Finlayson, who was the  
16 program director at that time, and Dr. Doe, met to discuss  
17 some concerns about her performance.

18 Now, as you'll see the record Dr. Doe is sensitive  
19 about those discussions. Although, she did mention them to  
20 Dr. Knapik. In fact, you'll see an e-mail in there where  
21 they sort of have an exchange of, well, how do you know, how  
22 do you know we had this discussion. And it's obviously that  
23 Dr. Doe was extremely sensitive about those discussions.  
24 And that's important because we get into the issue of this  
25 letter and how it was communicated to Dr. Knapik.

1           So after they had that meeting Dr. Finlayson sends  
2 an e-mail to Dr. Doe with a letter of, that is one of the  
3 subjects of this litigation, I know the Court has seen the  
4 letter.

5           THE COURT: What do you call it, the warning  
6 letter?

7           MR. PANDOLPH: Yes. Well, it's -- he calls it a  
8 letter of concern. So he sends a letter by e-mail. He  
9 testified, you know, that's what he has described in his  
10 deposition is a letter of concern. Dr. Doe calls it a  
11 remediation or performance improvement. But the important  
12 thing was it's not probation. And I'll talk about that.

13           So he sends the e-mail to her with the letter  
14 attached. The Court has acknowledged that this is a private  
15 and confidential letter that's protected under New Hampshire  
16 Law. It says it in the policies and procedures manual.  
17 That's, the residents know that.

18           Now, as I said, the letter doesn't say to Dr. Doe,  
19 you are on probation. It doesn't use the word probation.  
20 Dr. Finlayson, the author of the letter, testified that he  
21 did not consider Dr. Doe on probation. The residency  
22 program never considered Dr. Doe on probation. As I said,  
23 Dr. Doe described it as a remediation.

24           According to Dr. Knapik, Dr. Finlayson and the  
25 residency program are wrong and it's a or that she knows



1 better than them and so it's probation.

2 Again, the author of the letter of the residency  
3 program never considered that Dr. Doe was on probation.

4 So how does Dr. Knapik get the letter? Well, to  
5 step back a minute Dr. Knapik, Dr. Doe and Dr. Goodwin, the  
6 three general surgery residents, receive what they call  
7 ABSTES test scores, American Board of Surgery and Training  
8 Examination Scores in February of 2011.

9 They get them individually by e-mails from, from a  
10 residency program administrator. Dr. Doe's test score was  
11 good. At 8:29 a.m. on March 24, 2011 Dr. Doe's test score,  
12 the e-mail that sent Dr. Doe's test score, was forwarded to  
13 Dr. Knapik.

14 Dr. Doe says, I never forwarded that to  
15 Dr. Knapik. No message with the e-mail like, here's my test  
16 score. Just simply forwarded. And that's also part of the  
17 record. Most people, when you forward something, would  
18 presumably send a message, but no message with this e-mail.

19 So, again, at 8:29 that e-mail was forwarded with  
20 the test score. At 8:49 that same morning, March 24, 2011,  
21 the e-mail from Dr. Finlayson to Dr. Doe is also forwarded  
22 to Dr. Knapik with the letter attached. Again, no message,  
23 here's the letter, no response, why are you sending me this  
24 letter. Nothing in writing that acknowledges anything about  
25 sending of the letter other than the simple fact that it was

1 forwarded from --

2 THE COURT: If I can interrupt, are these  
3 circumstances for trial? I mean, we're at summary judgment  
4 so we have to accept the facts as they are sworn to by the  
5 plaintiff. And there's a dispute or really more of a  
6 mystery I think than a dispute about how the thing came  
7 over, but for summary judgment purposes don't we have to  
8 start with Dr. Knapik's position, which is that Dr. Doe  
9 voluntarily shared the letter with her?

10 MR. PANDOLPH: Normally you would but let me  
11 respond to that in two ways. Under the arbitrary and  
12 capricious standard a determination is, determination is not  
13 arbitrary and capricious merely because there may be  
14 contradictory evidence. That's a little bit different than  
15 a normal summary judgment, is there a genuine issue of  
16 material fact. Because you're looking at the decision of  
17 the residency program to determine is there evidence to  
18 support that determination, was there substantial evidence  
19 to support that determination.

20 So the fact that this contradictory evidence -- so  
21 there's a dispute between Dr. Doe's version and Dr. Knapik's  
22 version that does not preclude summary judgment under an  
23 arbitrary and capricious standard as long as a reasonable  
24 residency program could have accepted Dr. Doe's version of  
25 the facts. But I also will say, I don't think it's a

1 material issue under, even under the normal summary judgment  
2 rules for a couple of reasons. Even if you assume, and  
3 we'll accept Dr. Knapik's version of the fact that she  
4 received the letter from Dr. Doe, that's really -- it was a  
5 secondary issue. Because she was dismissed not because she  
6 received the letter, but because --

7 THE COURT: No, because she published it.

8 MR. PANDOLPH: -- what she did with it. So,  
9 again, there's two reasons why I don't think that precludes  
10 -- admittedly Dr. Knapik says X., Dr. Doe says Y., but it  
11 doesn't preclude summary judgment, again, for those two  
12 reasons. Primarily because under an arbitrary and  
13 capricious review the Court sort of is sitting more as an  
14 appellate court when you make a determine under a arbitrary  
15 and capricious review. So it doesn't, contradictory  
16 evidence doesn't change that. And, again, the residency  
17 program had the right to accept, if it was reasonable, had  
18 the right to accept Dr. Doe's version of the facts.

19 The other thing about the letter is, as I think we  
20 mentioned, after it was forwarded, normally when you forward  
21 an e-mail you'll see it in your sent directory. Dr. Doe  
22 checked. It was not in her sent directory. Somebody  
23 deleted it from her sent directory. When you normally  
24 delete something from the sent directory it then goes to a  
25 deleted file directory. It was also deleted from that file.

1 So it appears that somebody took steps to make sure that it  
2 was difficult to find that that was forwarded where Dr. Doe  
3 did see other e-mails around the same period.

4 THE COURT: So not to get too deep in the weeds  
5 with you on this, but that would rule out something as  
6 simple as Dr. Knapik having access to the log in e-mail  
7 password, right? Because that would, if she had simply  
8 logged in as Dr. Doe, my wife logs in as me all the time,  
9 then that would show up as a forward and would leave that  
10 record. So this is something --

11 MR. PANDOLPH: That would show up as what?

12 THE COURT: It would show up as a forward to her,  
13 to her account.

14 MR. PANDOLPH: No, you know, even on your e-mail  
15 system you have -- if you are logged into your e-mail system  
16 you have access to your e-mail's in box, you have access to  
17 your sent items, and you have access to your deleted items.

18 So if I, if I forwarded an e-mail from my wife it  
19 would, it would come forwarded to me. And then she would,  
20 you know, she would forward it to me, but she could also  
21 then go into her sent items and delete it from there so it  
22 wouldn't be -- while she was on the system and she could  
23 also go into her deleted items and delete it. You can do  
24 that while logged on. I mean that's my point.

25 So, anyway, Dr. Knapik prints the letter. I think

1 one of her friends testified that she found it in a magazine  
2 at her house and so she had it hanging around. Again,  
3 Dr. Doe testified that she never sent it to Dr. Knapik.

4 Interestingly, later that spring, another e-mail  
5 with the test scores we talked about of Dr. Goodwin's, who I  
6 mentioned earlier, was also forwarded to Dr. Knapik.

7 Now, he also testified, that I never forwarded  
8 that e-mail to Dr. Knapik. And he said, I had a very poor  
9 test score and I was embarrassed by it. I would never do  
10 that.

11 So now you have two people who have no motivation  
12 to lie say, we never forwarded those e-mails to Dr. Knapik.

13 And I think to step back this, you've heard in  
14 their response they sort of suggest, well, how could  
15 Dr. Knapik forward an e-mail with a letter if she didn't  
16 know about the letter.

17 Well, again, it can be explained a couple of ways.  
18 First of all, you have the test scores. She had that. She  
19 got an e-mail herself from the test scores and knew that  
20 those test scores were out there. And the sequence is the  
21 test score was forwarded first and then the letter second.  
22 Dr. Doe obviously discussed the issue she was having with  
23 Dr. Finlayson so she had knowledge about that. But, you're  
24 right, I think the bottom line is, although it is a  
25 secondary issue, a reasonable residency program could

1 determine that Dr. Knapik had forwarded these e-mails to  
2 herself.

3 THE COURT: Is there a record that shows that  
4 that's what they actually decided, that she has sort of like  
5 a, one of these Chinese military groups with super hacking  
6 powers and can get in or did they actually make a decision  
7 about how she got the letter or is she sort of where I am, I  
8 don't know?

9 MR. PANDOLPH: What's that?

10 THE COURT: Is she sort of where I am, which is I  
11 don't know how she got the letter?

12 MR. PANDOLPH: Well, again, it's a secondary  
13 issue. It was not part of the termination letter.  
14 Although, they did mention electronic access. So it is a  
15 little bit of a mystery about that, but I think a reasonable  
16 residency program could have made that determination.

17 THE COURT: But do we know that they did?

18 MR. PANDOLPH: Well, all I can glean from the  
19 termination letter is they said she violated the electronic  
20 e-mail system. But, again, you're right, it was not, it was  
21 not the basis, the primary basis for the, for the decision  
22 to dismiss her from the program. It is a secondary issue.

23 So Dr. -- we're also back still in 2011. Dr. Doe  
24 applies for a fellowship to continue her training, which  
25 would have ended in June, 2012. So you do that in your

1 fourth year even though you're going to continue to a fifth  
2 year.

3 So in connection with that application progress  
4 she asked Dr. Finlayson whether she should answer yes to the  
5 question of whether she was ever on probation.

6 THE COURT: Dr. Doe did?

7 MR. PANDOLPH: Yes.

8 THE COURT: Yeah, I remember that.

9 MR. PANDOLPH: Dr. Finlayson tells her no, you  
10 don't have to do that because you were not, you were never  
11 on probation.

12 THE COURT: Right.

13 MR. PANDOLPH: As an aside, in the response to the  
14 summary judgment motion, all the plaintiff does is say,  
15 well, Dr. Doe is not credible on that issue. They don't  
16 really counter it with any substantive evidence or anything.  
17 So that's not sufficient to counter a statement of fact.

18 So Dr. Doe's testimony is that she spoke to  
19 Dr. Finlayson and he said, no, you don't have to disclose  
20 that.

21 THE COURT: And he remembers it the same way in  
22 his deposition?

23 MR. PANDOLPH: He wasn't asked at his deposition.

24 THE COURT: He wasn't?

25 MR. PANDOLPH: The plaintiffs took his deposition.

1 But I just looked at it the other day and I didn't see that  
2 he was asked the question. So, all right, Dr. Knapik's  
3 testimony is, well, Dr. Doe was supposed to disclose to the  
4 fellowship program this letter that she was on probation.

5 No writing about this issue, but she testified  
6 that even though really if you see the file every, seemingly  
7 every small dispute is e-mail after e-mail, but nothing ever  
8 about this issue.

9 THE COURT: Right. So we do have the strange  
10 conversation with the mom, right?

11 MR. PANDOLPH: You have the conversation with the  
12 mom.

13 THE COURT: And that I think is not disputed.  
14 Does everybody agree that that conversation happened?

15 MR. PANDOLPH: I can't answer that, but --

16 THE COURT: No, I don't mean to interrupt your  
17 presentation, but I didn't sort of track it down. Do both  
18 sides agree that the conversation with Dr. Doe's mom and  
19 Dr. Knapik happened in the spring of 2011?

20 MR. WATTS: Yes.

21 THE COURT: Okay. That's what I thought. So we  
22 know, one thing we can be certain of is by the spring of  
23 2011 Dr. Knapik had the letter because she talked about it  
24 with Dr. Doe's mother.

25 MR. PANDOLPH: Yes. Yeah. And it was forwarded



1 to her. We have evidence that the mother was --

2 THE COURT: And you have evidence it was  
3 forwarded?

4 MR. PANDOLPH: Yeah. The question is how did she  
5 get it. You know, they suggest that, well, Dr. Doe then  
6 must have known that she had the letter. It's not clear  
7 when Dr. Doe and her mother had a conversation where she  
8 relayed that. So I don't think the timing is there. But  
9 you're right, that conversation was Dr. Doe's mother or  
10 Dr. Knapik said, you know, you have to disclose this letter  
11 to the fellowship application in 2011. Again, Dr. Doe's  
12 mother said, no, she talked to Dr. Finlayson, he said  
13 didn't, she was not on probation. Of course, Dr. Knapik  
14 takes no action in 2011.

15 THE COURT: Well, we can sort of fast forward to  
16 the spring of the 2012, right, because the thing just sat  
17 for a year?

18 MR. PANDOLPH: Right. So the question is -- the  
19 story, it's an ever changing story, Your Honor. And I will  
20 illustrate it this way, when you ask Dr. Knapik or when  
21 Dr. Knapik has to present a reason why she sent the letter  
22 to the fellowship program she says, well, and Dr. Doe lied  
23 on her application. Okay.

24 And then when you say, well, if that's the case  
25 why did you wait till 2012 to do it and not do anything in

1 2011. And then she responds and says, oh, well, no, it  
2 wasn't the fellowship application, it was really the  
3 application for a medical license to the Kentucky Board of  
4 Medical Licensure in 2012 that prompted me to send the  
5 letter.

6 And then you, say, well, okay, if that's the case,  
7 you sent the letter to the Kentucky Board of Medical  
8 Licensure why did you send a letter to the fellowship  
9 program. And you just keep going back and forth on the  
10 issue.

11 Okay, you're right. So let's jump to 2012. First  
12 of all, Dr. Doe and Dr. Knapik signed their last agreement  
13 of appointment in June of 2011 that's supposed to run from  
14 June, 2011 to June, 2012.

15 The agreement says that the hospital may terminate  
16 her appointment at any time upon any reasonable basis,  
17 including for conduct unbecoming of a physician. That's the  
18 agreement that was in place at the time that she was  
19 dismissed. Again, it incorporates the policies and  
20 procedures we talked about a little bit earlier.

21 In our pleadings we provide a lot of detail about  
22 how the relationship between Dr. Knapik and Dr. Doe changed  
23 in early 2012.

24 THE COURT: I'm pretty much up on it. I've been  
25 through it a bunch of times.

1 MR. PANDOLPH: And just as one illustration of  
2 this, and Dr. Knapik's really uttering ability to take  
3 responsibility for anything, in an April, 2012 e-mail she's  
4 critical of Dr. Doe for asking her to return a gift. And  
5 she states, quote, what a bitch.

6 Now, most people would say, you see that and you  
7 say, yeah, I was mad, and I said that. Not Dr. Knapik.  
8 She --

9 THE COURT: All right. Let's get to the legal  
10 issues.

11 MR. PANDOLPH: Okay. So Dr. Doe's application for  
12 a Kentucky Medical License she makes her application for a  
13 medical license. Dr. Knapik says that she learned that in  
14 March of 2012 that she was going to answer no to the  
15 question of whether she was on probation, of course, based  
16 on her conversation with Dr. Finlayson back in 2011.

17 Again, no writing about this issue. But it was  
18 simply not true. She was not on probation. And, moreover,  
19 the application, if you have the application, it states that  
20 only disciplinary probation needs to be disclosed, not  
21 academic probation.

22 So even if she was on probation it wasn't  
23 something that needed to be disclosed because it was  
24 obviously an academic probation.

25 So we have this scheduling dispute in late April,

1 early May. Dr. Knapik does not want to be on call on the  
2 weekends before or after her vacation. So at 6:43 a.m. on  
3 May 3, 2012 Dr. Doe tells Dr. Knapik that she had to be on  
4 call on June 16 even though she made travel plans.

5 At 7:38 a.m. on that same day Dr. Knapik goes on  
6 line and gets information about Dr. Doe's fellowship  
7 program, including the address of Dr. Endean who was the  
8 program director.

9 THE COURT: In Kentucky?

10 MR. PANDOLPH: Yeah, in Kentucky. Correct. A few  
11 days later, right in the middle of this scheduling dispute,  
12 Dr. Knapik takes the 2011 letter from Dr. Finlayson, puts it  
13 in a business envelope that has a Dartmouth Hitchcock  
14 Medical Center return address, puts a DHMC postage label on  
15 it, mails it to Dr. Doe's fellowship program without any  
16 explanation.

17 Reasonable to conclude that it was meant to be  
18 suggested that it was from the residency program, which in  
19 fact is how it was taken.

20 No -- what doesn't she do? She doesn't try to  
21 confirm with anyone with the residency program whether  
22 Dr. Doe was indeed on probation. She doesn't discuss these  
23 ethical concerns with anyone connected with the residency  
24 program.

25 She doesn't use any of the means that were

1 provided by the program to raise confidential concerns  
2 internally. She doesn't send anything that --

3 THE COURT: Right. She pops it in the mail?

4 MR. PANDOLPH: Yeah. She doesn't say anything  
5 to --

6 THE COURT: Yes, I know.

7 MR. PANDOLPH: Okay. The University of Kentucky  
8 responds to the program and says, we got this letter. On  
9 May 31, 2012 we obtained information, the residency program  
10 obtains information about Dr. Knapik's going on line on May  
11 3, 2012, like I said, and found the address.

12 She's told about it on June 1, 2012, which is a  
13 Friday. Her first instinct is to deny that she sent the  
14 letter. Perhaps not a quality that one wants in a  
15 physician, but she's persuaded by friends to admit that she  
16 did it and she does.

17 She hires legal counsel. And she's placed on paid  
18 leave. She then meets with representatives of the residency  
19 program, explains why she did it and what she did. They  
20 review the matter internally including with an ethicist to  
21 see what's the appropriate response.

22 And on June 12, 2012 they sent a letter that  
23 dismisses her from the program, but also provides her with  
24 the grievance option that she has available to her.

25 And it's important to note the dismissal was not

1 because of any ethical concerns that she may have had, but  
2 the way that she acted on those purported ethical concerns.  
3 And that's basically what happened.

4 As I said, the two arguments are that she failed  
5 to exhaust her administrative remedies. And the second  
6 argument is that substantively it was not arbitrary and  
7 capricious.

8 Now this Court has already said that the New  
9 Hampshire, general rule under New Hampshire law is that  
10 administrative remedies must be exhausted before a party may  
11 bring a matter to court. Although there's no New Hampshire  
12 case on point, the Court has also noted that the weight of  
13 authority that medical residents must exhaust the hospital's  
14 internal grievance procedures before seeking the challenge  
15 to dismissal in court.

16 The purpose of that is obviously judicial economy.  
17 If the decision is overturned we don't have a case. It  
18 creates a record, etcetera.

19 THE COURT: I'm with you on the general principle  
20 without much trouble. Here's the part that I've been  
21 struggling with, which is the exception for institutions  
22 that have already irrevocably committed themselves to an  
23 outcome and whether you have to go through what looked like  
24 the motions of the grievance at that point. And I'm struck  
25 by the things that the hospital, Dartmouth Hospital did

1 around June 12th that would indicate that they weren't  
2 changing their mind no matter what.

3 And the one that really sticks out is their  
4 contact with the Kentucky, not Kentucky, Florida where  
5 Dr. Knapik was scheduled to start her job and some other  
6 things, but that looks like an institution that when you  
7 call your fellow institution and say, we're kicking out,  
8 we're not graduating our resident that doesn't look like a  
9 reversible decision. What do you think?

10 MR. PANDOLPH: Well, first of all, there was -- it  
11 was a compressed time period.

12 THE COURT: Right.

13 MR. PANDOLPH: And the University of Miami was  
14 requesting information about her status.

15 THE COURT: Miami called or, I thought this was a  
16 voluntary contact by Dartmouth?

17 MR. PANDOLPH: There were e-mails exchanged. And  
18 I'll have to check to see who made the first contact, but I  
19 believe that, I just don't recall it, but I will check on  
20 that.

21 THE COURT: I thought, my reading of the file was  
22 that one of the doctors at Dartmouth took it on himself to  
23 start that process, that it wasn't just a routine, oh, is  
24 our person still good, you know, we're checking on the  
25 status of our future fellow.

1           MR. PANDOLPH: Well, that's the way -- this is the  
2 way that they proceed with these kind of things. They make  
3 a decision and then they tell the residents that they have a  
4 right to an appeal.

5           THE COURT: Right.

6           MR. PANDOLPH: That's how it happened in the  
7 Connors case. That's how it happened in this case. And the  
8 reason for that is you simply can't recommend, in the sense  
9 of making no decision, because if the resident takes no  
10 action to appeal it or file a grievance then what's the  
11 status. I mean --

12          THE COURT: Well, it's got a five day clock on it,  
13 right?

14          MR. PANDOLPH: Right. Now, I don't -- irrevocable  
15 in the sense that the -- in the letter itself it says this  
16 is the grievance policy and you have a right to a grievance.  
17 A grievance committee is formed, it includes different  
18 people, other program directors. It also includes a  
19 resident. So I'm not sure why the Court would think that  
20 that was irrevocable when you say, all right, we're  
21 dismissing you from the program, but here's your appeal  
22 right.

23          The second thing is --

24          THE COURT: Because they've gone on record and  
25 interfered with the future employment at the next



1 institution, which is maybe an appropriate step, but is a  
2 hugely significant one.

3 MR. PANDOLPH: But that doesn't mean that the fair  
4 hearing committee cannot -- it's set out on the policies and  
5 procedures. The fair hearing committee can say no, you got  
6 to take this resident back. It can reverse the decision of  
7 the program director.

8 Now, whether it's announced or not doesn't mean  
9 that the committee can't do that.

10 The other point is Dr., you know, Dr. Knapik does  
11 say, oh, yeah, I didn't know that I had -- it was  
12 irrevocable, I had a right to a fair hearing. That's not  
13 how she testified about why she didn't proceed with the fair  
14 hearing process.

15 In her deposition she said, I didn't think they  
16 would make a correct decision or right decision. She  
17 doesn't say anything about, oh, I thought it was a final  
18 irrevocable matter. That's something that's just been  
19 presented in opposition to the motion for summary judgment.

20 And you can't alter your deposition testimony in  
21 response to a summary judgment motion. The other thing is  
22 she submits an affidavit from her therapist who says, yeah,  
23 she told me the reason why she didn't proceed with the fair  
24 hearing process is that she didn't have the right to have  
25 counsel present.

1           Those are the reasons -- she knew -- the bottom  
2 line she and her counsel knew that she had a right to this  
3 hearing and it could have reversed the decision that was  
4 made. This idea that they thought there was no appeal right  
5 or it was irrevocable is just something that's a new  
6 argument that they've made. It's inconsistent with what the  
7 prior testimony is.

8           THE COURT: But would it be a subjective, kind of  
9 what was in her mind standard, or wouldn't we examine the  
10 process from a more objective perspective?

11           MR. PANDOLPH: I think it's more -- from what I've  
12 seen in the case it's somewhat subjective. What, you know,  
13 she says I didn't, you know, it was nothing in there that I  
14 had the right to do this, a right to do that. She knew.  
15 And that's the bottom line. She knew that she had this  
16 right to appeal. She knew that she had a right to have this  
17 evidentiary hearing. It wasn't that she thought the  
18 decision was final.

19           That's her own testimony. She said, I knew I had  
20 a right to do it, I wasn't going to do it, I decided not to  
21 do it. I consulted with counsel and simply decided not to  
22 do it. I don't think that that -- I think the failure to  
23 exhaust applies in that circumstance.

24           THE COURT: So that takes us to the, kind of the  
25 merits, which is summary judgment, no fact finding, no jury

1 trial on the question of the correctness of the hospital's  
2 decision?

3 MR. PANDOLPH: Well, here's the, you know, the  
4 first issue, of course, is the standard of review.

5 THE COURT: Right.

6 MR. PANDOLPH: That's the big issue. The, as I  
7 think the Court's prior order on the certification question  
8 acknowledged, and just the cases from New Hampshire Supreme  
9 Court that we cited, a hospital is entitled to deference  
10 with respect to its determinations regarding a resident's  
11 dismissal from their program.

12 I don't think that the defendant or the plaintiff  
13 argues that it, that that's not the case. They suggest that  
14 it doesn't apply in this circumstance because the decision  
15 was disciplinary and not academic.

16 Well, I think there's a difference between  
17 academic grounds and the word academic deficiency, which is  
18 used in the letter. But putting that aside, that  
19 distinction is not relevant for substantive claims. That's  
20 a distinction that's recognized by the courts in connection  
21 with due process, constitutional due process claims. And it  
22 really affects the amount of due process required, whether  
23 it's disciplinary or academic. It's still an exercise of  
24 professional judgment.

25 But in this case a couple things. First of all,

1 Dr. Knapik has not made a procedural due process claim.

2 Okay. Second of all, it is a private hospital so you have  
3 issues about whether that even applies.

4 The bottom line is even in the cases that were  
5 cited by the plaintiff the arbitrary and capricious standard  
6 applies to both academic and disciplinary dismissals.

7 So, I mean, this was an academic. And as the  
8 Court's recognized in its order, dismissal based on ethical  
9 concerns is a dismissal on academic grounds. So I don't  
10 think there's any dispute, no dispute that this is  
11 deferential review and that the arbitrary and capricious  
12 standard should apply.

13 And, again, what that means is the Court has to  
14 assess whether a reasonable program, residency program could  
15 have determined that Dr. Knapik engaged in conduct  
16 unbecoming of a physician and a violation of that.

17 It's a very, very -- the courts, you know, the  
18 cases we've cited is a very high standard. In fact, I think  
19 it basically says it has to be so out of bounds that it is  
20 not an exercise of professional judgment at all.

21 Clearly, I think that the record supports that  
22 this was an exercise of professional judgment by the  
23 residency program.

24 Now, we started talking about this before in terms  
25 of what does this mean in terms of the summary judgment

1 standard. As I said before, when you engage in arbitrary  
2 and capricious review I sometimes think of it as the Court  
3 putting on the hat of an appellate court. Whether, again,  
4 whether there's contradictory evidence doesn't mean that  
5 summary judgment should not be granted. Whether the Court  
6 might have decided it differently, whether the Court or a  
7 jury might have decided it differently doesn't mean that the  
8 decision was arbitrary and capricious.

9 That's a very different standard than the normal  
10 summary judgment motions that we talked about before.

11 So that -- and, again, they don't even respond and  
12 say -- they never argued that the decision was arbitrary and  
13 capricious. As I said, they, you know, they admit that they  
14 sent the letter in the manner that they sent it and that was  
15 found objectionable by the residency program.

16 So I think they waive that argument if the Court  
17 finds that, that that's the standard.

18 There's also some other, other issues in terms of  
19 whether this is wrongful termination of employment claim.  
20 And we talked about that in our briefs. And as I noted  
21 before, the primary purpose is not an employment dispute.  
22 The primary purpose of this is academic training and the  
23 academic certification.

24 And even if you look at their complaint their  
25 beef, what they say is that, well, I was not allowed to

1 graduate, I didn't receive the certification that I needed  
2 to go forward. It's not a dispute about anything related in  
3 the employment context. So for that reason alone it's not a  
4 wrongful termination of employment claim.

5 Now, in the cases we've cited from New Hampshire,  
6 you know, whether that allows a tort, public policy tort for  
7 some other reasons I guess that can be debated. There are  
8 cases from New Hampshire that say when hospital privileges  
9 are denied to a physician that there's a claim there or when  
10 an HMO, you know, dismisses a physician from its, from its  
11 network. But even if those public policy reasons apply in  
12 this circumstance, and there are reasons that it's not the  
13 same kind of patient-physician relationship, that are at  
14 issue in those cases that make that sort of fly, the  
15 standard is still the same.

16 The Court says the standard is arbitrary and  
17 capricious. So whether it's a contract claim or a tort  
18 claim, breach of good faith and fair dealing claim, it's  
19 deferential review, arbitrary and capricious, and that's the  
20 standard.

21 And if you apply that standard to these facts I  
22 don't think you can reach any other conclusion that a  
23 reasonable residency program could have made the  
24 determinations that were made in this case and, therefore,  
25 summary judgment should be granted in favor of the

1 defendants.

2 THE COURT: So is the arbitrary and capricious  
3 decision always made by the judge prior to the jury trial or  
4 are there closer cases where the jury would decide whether  
5 the action was arbitrary and capricious?

6 I mean, an example that occurs to me, the record  
7 in this case and in any medical or residency program dispute  
8 shows it's a kind of an intense environment, people stay up  
9 too late, they work too hard, they get mad and they have  
10 tiffs. I'm not talking about the facts of this case, but  
11 there are plenty of, you know, bursts of anger between the  
12 attending physician and the resident that blow over and they  
13 go on.

14 If one of those blew up into a dismissal of a  
15 person, that's kind of a thin record, and they filed suit,  
16 as the plaintiff has here, I would just look at this and  
17 decide without a jury that this is arbitrary and capricious  
18 or not or does the jury get to decide this at some point?

19 MR. PANDOLPH: Primarily it seems that the courts  
20 make these decisions. I can't preclude that there may be a  
21 circumstance where a Court could say, a reasonable jury  
22 could find that it was arbitrary and capricious.

23 It's a very high standard. I can't rule out that  
24 that's possible in some circumstance. I think you need to  
25 play a gatekeeping role here. And I don't think it's just

1 simply a normal summary judgment gatekeeping role. It's a  
2 very high standard.

3 So perhaps there's some circumstance where the,  
4 you know, where the evidence is that maybe a reasonable  
5 juror could find arbitrary and capricious conduct because it  
6 was, as you say, it was so thin. I don't think the facts  
7 and circumstances --

8 THE COURT: Or a personality dispute or something  
9 like that?

10 MR. PANDOLPH: Yeah. Yeah. I don't think the  
11 facts of this case -- I can't rule that out. No claim of  
12 New Hampshire law on that point, but in a case like this  
13 where there is, where there's plainly -- even if the Court,  
14 as I said, even if the Court may have decided it differently  
15 had it been looking at it de novo that it doesn't survive  
16 that standard.

17 The bottom line it's not supposed to go to a jury  
18 for them to say de novo, I think it's correct or incorrect  
19 what the residency program did. I would have done it  
20 differently. That's just not the test. It's a very, I  
21 think a very high, very high bar.

22 As I said before, it almost has to amount to a  
23 finding by the Court that it was -- there was no -- there  
24 was no professional judgment exercised. As you know, you  
25 could probably think of an example of that in some



1 circumstances. Certainly not in this case.

2 THE COURT: And then looking back over the factual  
3 record before you started, which was very helpful, I think  
4 almost, I'll hear the plaintiffs out on this, but I think  
5 everything is pretty much agreed because it's in writing  
6 except for that sort of initial question of how did  
7 Dr. Knapik get the letter, which is sort of hotly contested.

8 MR. PANDOLPH: I think that's absolutely correct.

9 THE COURT: But I can't off the top, I've been  
10 through it a couple of times, I can't really think of  
11 another sort of decision point that is strongly disputed.  
12 Though I'm sure I'll be reminded of one in a minute.

13 MR. PANDOLPH: I think that's correct.

14 THE COURT: Okay. Good enough. Thank you.

15 MR. WATTS: May I?

16 THE COURT: Please. Good to see you.

17 MR. WATTS: Good afternoon, Judge Crawford. It's  
18 a pleasure to be here in your court again.

19 I think it's important to understand in this case  
20 that the defendant's role here, the defendant's position has  
21 moved precipitously over time. A good example of that is  
22 they contended in their, they asserted clearly in the  
23 termination letter, and in the letter to the Miami  
24 fellowship, that Dr. Knapik was not terminated for academic  
25 reasons.

1 THE COURT: Was what?

2 MR. WATTS: Dr. Knapik was not terminated for  
3 academic reasons.

4 THE COURT: Right.

5 MR. WATTS: And yet here they are saying that she  
6 was terminated for academic reasons. I think that, among  
7 other shifts that have occurred, undermine their, their case  
8 for summary judgment. And, of course, they have the burden  
9 of proof in the summary judgment process.

10 First off though, they indicated a moment ago that  
11 Dr. Knapik failed to exhaust her administrative remedies.  
12 We've presented to you in our pleadings our side of that  
13 issue.

14 More importantly, the defense didn't plead that.  
15 It's an affirmative defense and they didn't plead it. So  
16 our contention is here that they waived it.

17 Beyond that, there were no administrative remedies  
18 to exhaust. If you look at the record, the chronology was  
19 that when Dr. Knapik first learned that she had been  
20 terminated, that the decision had been made to terminate  
21 her, there had been no recommendation for her dismissal.

22 The rules clearly say in the personnel policy  
23 manual that the process is this, there's a recommendation  
24 for the resident's dismissal. That goes to the resident.  
25 And from that point on the resident for five days has the

1 opportunity to appeal.

2 Well, that didn't happen with Dr. Knapik. The  
3 defendant precipitously jumped right to termination and  
4 said, you're fired and Dr. Kispert said it's irrevocable.  
5 And on the very same day that she received the termination  
6 letter Dr. Kispert, the program director, cancelled her  
7 board certification, her graduation and her fellowship.  
8 That's a fait accompli. Dr. Kispert said it's irrevocable.

9 In her -- she has testified that she felt in  
10 effect that it was futile for her to exhaust administrative  
11 remedies. And that's one of the exceptions, as you pointed  
12 out up front, that's one of the exceptions to any duty to  
13 exhaust administrative remedies.

14 Well, in New Hampshire there is no such duty any  
15 way. The case law that the defense is relying on is old,  
16 antiquated, outdated case law. The current case law is that  
17 with a statute or with a specific agreement a C.P.A., or  
18 whatever, there may be a duty to exhaust. But in this case  
19 the agreements between the parties, there's no such animal  
20 that says you must exhaust administrative remedies, you must  
21 appeal here before you can go elsewhere.

22 THE COURT: What about the handbook that  
23 has --

24 MR. WATTS: Pardon?

25 THE COURT: What about the handbook that has these

1 rules? When they sign on a resident don't they sign on to  
2 the terms of this, the handbook is not quite what they call  
3 it, but this manual?

4 MR. WATTS: The manual. Yes, the manual says you  
5 will have an opportunity to a fair hearing once the  
6 recommendation was made. There was no recommendation made  
7 in this case. She was canned immediately.

8 THE COURT: That part I'm sympathetic to, but the  
9 part that haunts me a bit is I can't imagine why a person  
10 wouldn't, given the stakes, go forward and at least try. I  
11 mean --

12 MR. WATTS: Well, if you look at, if you look at  
13 what she knew -- well, Dr. Kispert told her it was  
14 irrevocable, period. And based upon that, plus her  
15 knowledge that her -- everything had been cancelled  
16 irrevocably, what good does it do.

17 Plus the institution that would be managing the  
18 appeal process had already endorsed Dr. Doe's graduation and  
19 sanctioned her even though Dr. Kispert, Dr. Finlayson and  
20 others had already asserted in the record that she was a  
21 liar and that she was incompetent on occasion in terms of  
22 her clinical skills. And so --

23 THE COURT: Well, it isn't that only one of these  
24 women can graduate. There's room for two to walk across the  
25 stage. I mean, Dr. Doe's situation has got nothing to do

1 with Dr. Knapik's by the spring of 2012.

2 MR. WATTS: Well, of course, they both could  
3 graduate, but the fact is when we're talking about her  
4 potential appeal or interest or concern or devotion to  
5 appealing she looked at the organization, the institution  
6 and it had already endorsed Dr. Doe and taken Dr. Doe's side  
7 of the story about the letter being sent, about how  
8 Dr. Knapik acquired it. All of that. They had bought hook,  
9 line and sinker Dr. Doe's story, at the same time overlooked  
10 all of the terrible things that Dr. Kispert had said in his  
11 e-mail that he posted in the resident's meeting about  
12 Dr. Knapik, I mean about Dr. Doe. And all of the, and all  
13 of the, what all the other attendings had said about her.

14 So Dr. Knapik is looking at this picture, all  
15 these things that in her life, her future had been  
16 cancelled. Plus the fact that Kispert said it was  
17 irrevocable and they had already endorsed Dr. Doe's version  
18 of the facts. So it's a totally futile effort. So it  
19 certainly fits within the exception assuming that they  
20 haven't waived the argument.

21 THE COURT: Will I find in the record that  
22 Dr. Kispert confirms that he said at that first meeting that  
23 it was irrevocable?

24 MR. WATTS: It's in Dr. Knapik's --

25 THE COURT: It's, that's her recollection of the

1 discussion?

2 MR. WATTS: That's correct. And I believe --

3 THE COURT: What about his?

4 MR. WATTS: I think in his deposition transcript  
5 it's also there. I think I asked him that very question.  
6 We would have presented it to you in the pleadings. So it  
7 should be readily available to you.

8 THE COURT: All right. I'll have a look.

9 MR. WATTS: So there's been much discussion about  
10 the standard of arbitrary and capricious. It's important  
11 for us to look at the truth here. Arbitrary and capricious  
12 standard is, is not a standard in and of itself. The case  
13 law expresses a much broader standard. And it's arbitrary,  
14 capricious, unreasonable, unsound. And there's ors between  
15 all of those words. It's not arbitrary and capricious per  
16 se. It's not an appellate decision for the Court, with all  
17 due respect. It's a matter of what was reasonable.

18 And we plead reasonableness in our complaint. I  
19 can't tell you the exact paragraph, but I think it's around  
20 71. And so the idea that we didn't plead that standard,  
21 what the standard is, the standard of review is absolutely  
22 wrong.

23 THE COURT: All right. But you agree with the  
24 addition of these other words, unreasonable and so forth,  
25 that what you are after is a jury trial in which the jury

1 would determine whether the action met that, fell below that  
2 arbitrary and capricious and unreasonable standard?

3 MR. WATTS: That's correct. I think your  
4 instructions to the jury would have to specify that under  
5 the prevailing case law.

6 THE COURT: Okay. So that's a point on which you  
7 agree with the defense?

8 MR. WATTS: Well, I don't agree that it's  
9 arbitrary and capricious. Arbitrary and capricious is not  
10 the standard. It's arbitrary or capricious, etcetera,  
11 etcetera.

12 THE COURT: Right, okay.

13 MR. WATTS: So it's much broader than what they  
14 have portrayed here. And, furthermore, even if arbitrary  
15 and capricious were the sole standard, as they have  
16 portrayed it, I think we could fit within that because they  
17 arbitrarily dismissed her taking the word of Dr. Doe, not  
18 even talking to Dr. Knapik about how she acquired the  
19 letter, what her true motivation was.

20 Dr. Freeman asked her some of the questions about  
21 what her motivation was, but he didn't communicate it to  
22 Dr. Kispert who is the gentleman who made the decision.

23 So there's a gap there. And I think it's  
24 important the Court to be aware of that and understand that.

25 THE COURT: As we look at what she did, I mean it

1 was probably the work of a few minutes for her, and we take,  
2 of course, months and years to look in hindsight, and these  
3 are young people also, but it strikes me that accepting her  
4 subjective view of the problem and her --

5 MR. WATTS: Which her?

6 THE COURT: Dr. Knapik's, your client's.

7 MR. WATTS: Okay. Thank you.

8 THE COURT: Understanding, accepting for purposes  
9 of summary judgment, that she felt ethically compelled to  
10 bring this problem forward, it strikes me she did it in  
11 absolutely the worse combination of ways that a person  
12 could.

13 In other words, she didn't go to Dartmouth, she  
14 didn't kind of follow her institution, she did it  
15 anonymously and she did it without notice to Dr. Doe. And,  
16 most importantly, from my perspective, it seems like she did  
17 it in violation of the quality assurance law for, which is  
18 binding on young doctors and all doctors in New Hampshire.

19 Am I missing it? I mean, looking at it, did  
20 she -- I couldn't imagine doing it in a worse way.

21 MR. WATTS: Well, let's start with the last point  
22 you made.

23 THE COURT: Sure.

24 MR. WATTS: Quality assurance. The letter was not  
25 stamped quality assurance.



1           THE COURT: Is that the criteria for a trained  
2 person?

3           MR. WATTS: Well, every letter that is in a  
4 quality assurance file or every notice or document in a  
5 quality assurance file is stamped. And the production, as  
6 you probably have already seen, the productions from the  
7 defense that are stamped quality assurance, that's the first  
8 notice that, oops, this is something that's important.

9           But beyond that I think one has to look at what  
10 the, what the rule here is. Excuse me. The American  
11 Medical Association has said and portrayed an ironclad rule  
12 that says the professionals must uphold the profession and  
13 they must report fellow physicians who they understand or  
14 believe to be either dishonest or incompetent, etcetera.

15           THE COURT: Yeah, I mean we have the same, we have  
16 the same rule here, lawyers.

17           MR. WATTS: Oh, yes. Of course.

18           THE COURT: Right.

19           MR. WATTS: And so that was her premise. She, she  
20 begged Dr. Doe, once she learned late in the spring of 2012,  
21 not '11 but '12, she received -- she understood that there  
22 was a letter in 2011, but she didn't know that Dr. Doe had  
23 sent it, had sent her applications without checking that box  
24 about disciplinary, discipline against her until 2012.

25           So that the gap there, the information is much

1 smaller than what's been portrayed to you. But --

2 THE COURT: Let me back up. When does she say,  
3 you'll remind me, I've been through this, and I get the  
4 accounts kind of muddled in my head, when does Dr. Knapik  
5 say she received the letter and how did she get it?

6 MR. WATTS: She received the letter from Dr. Doe.

7 THE COURT: A paper copy?

8 MR. WATTS: Either paper copy or computer copy  
9 looking at her computer. I think it was a paper copy  
10 because she had it and she didn't print it out. She,  
11 Dr. Knapik, didn't print it out. Dr. Doe gave her the  
12 letter.

13 And so they debated it. After Dr. Knapik learned  
14 that -- let me back up.

15 In the spring of 2012 Dr. Knapik was filling out  
16 her applications for fellowships and license. And she saw  
17 this question on the application which said, did you have  
18 any discipline against you, probation, etcetera.

19 THE COURT: Right.

20 MR. WATTS: She didn't know that that was part of  
21 the application process from 2011 on. It wasn't until --

22 THE COURT: If I can interrupt, she had already  
23 had the rather intense conversation with Dr. Doe's mom a  
24 year before in which she had asked about this very topic.

25 MR. WATTS: About the letter.

1 THE COURT: About disclosing it.

2 MR. WATTS: Well, okay. Disclosing it. But that  
3 doesn't mean that she had seen the application and she was  
4 aware of the lie.

5 THE COURT: I thought she was keenly alive to the  
6 problem, as she saw it, that Dr. Doe was not going to tell  
7 her fellowship application places about the letter of  
8 concern.

9 MR. WATTS: No. The discussion with momma was  
10 that she has this letter and it's something that needs to be  
11 disclosed.

12 THE COURT: Disclosed to whom?

13 MR. WATTS: Disclosed to the proper authorities.  
14 And that was another point that I thought you raised was,  
15 which proper authority? Are you talking about disclosing it  
16 to or questioning about disclosing it to Dartmouth.

17 Well, the AMA Rule says that you disclose it to  
18 whom the lie was made or to whom the issue was  
19 mis-portrayed. And that's why, that was one of the reasons  
20 she sent it to Kentucky instead of going to Dartmouth.

21 The other reason she didn't send it to Dartmouth  
22 was, again, that Dartmouth had already blessed Dr. Doe for  
23 graduation and overlooked all these maladies that she had  
24 engaged in. And so she felt that it was hopeless to send it  
25 to -- there would be no purpose served in sending it to,

1 giving it to Dartmouth. Dartmouth already had it also. But  
2 alerting doctor, the Dartmouth facilities that Dr. Doe had  
3 lied on an application.

4 It would have done no good in her view. And  
5 besides the lie, quote unquote, was made to the Kentucky  
6 licensing authority and the Kentucky fellowship and that's  
7 to whom she sent the letters.

8 And, furthermore, you made the point, it was sent  
9 anonymously. I think we pointed out in our briefs that the  
10 AMA encourages letters or notices or information to be sent  
11 to authorities in an anonymous way if she fears or if they  
12 fear retaliation.

13 Dr. Knapik had brooded on this over several weeks,  
14 many weeks. And it wasn't an easy decision for her to make.  
15 She and Dr. Doe had been friends. They had worked together  
16 side by side for years. And she was aware of Dr. Doe's  
17 shortcomings, but once she was aware of this verification on  
18 the application under oath or what she perceived to be the  
19 verification under oath she felt she had to act.

20 THE COURT: Okay. It just strikes me she could  
21 have saved herself a lot of misery if she had written a  
22 straight up letter explaining who she was, why she was  
23 taking the action that she had to and copying Dartmouth and  
24 Kentucky and Dr. Doe in on the whole thing, and it would  
25 have caused some hurt feelings, but I'm not sure we'd be

1 where we are today.

2 MR. WATTS: Well, we would be here today if she  
3 had sent anything to Kentucky regardless of when she  
4 disclosed to Dartmouth. Dartmouth would have pretty clearly  
5 lowered the boom on her anyway because they were the ones  
6 that -- Dr. Freeman was irate. He felt that the institution  
7 was embarrassed because Kentucky learned about this  
8 situation that Dartmouth already knew about. Dartmouth was  
9 well aware of Dr. Doe's shortcomings, but they graduated her  
10 nevertheless.

11 So they were embarrassed that they had done such a  
12 thing and it was going to ruin their reputation. And that's  
13 what Dr. Freeman, using some profanity, said to Dr. Knapik,  
14 you created a hell of a storm for us or words worse than  
15 that, but --

16 THE COURT: And then I guess the point I wanted to  
17 nail down was this letter of concern a quality assurance  
18 document within the meaning of the New Hampshire statute or  
19 not?

20 MR. WATTS: Well, Dr. Knapik is not a lawyer.  
21 She's not -- she had not read the statutes. She --

22 THE COURT: She did not get training there on  
23 privilege and privacy?

24 MR. WATTS: No. I specifically asked Dr. Freeman  
25 for the training for ethics and in that whole area. And he

1 said, no, no such training.

2 And so they don't know about it. And so that's  
3 presumably why those documents are all stamped quality  
4 assurance because it alerts non-lawyers to the fact that  
5 this is a secret document that can't be transmitted  
6 anywhere. But even if she did know the overriding precept  
7 here is what the AMA standard is. And that is she has to  
8 disclose a fellow physician who has been dishonest. And  
9 that was her motivation.

10 And all this talk about the book being stolen and  
11 the statement made that she called Dr. Doe --

12 THE COURT: I shut off your colleague on the same.  
13 I don't care about the tittle-tattle between these people.

14 MR. WATTS: Thank you.

15 THE COURT: They have a long, unhappy history and  
16 presumably its come to an end.

17 MR. WATTS: Okay. So the important point then is  
18 to focus on the fact that she didn't have a duty to exhaust  
19 remedies. The arbitrary and capricious is a much broader  
20 standard of reasonableness. And that the defense's case has  
21 been bouncing around. Every time we raise a specific  
22 defense or an argument they change their story particularly  
23 on the academic dismissal matter.

24 And so when the Court evaluates this, not as an  
25 appellate, but evaluating the summary judgment motion, with

1 the burden on their side, presumably the Court will be  
2 looking at these as they really are not as they are  
3 portrayed.

4 THE COURT: So your dream result would be here a  
5 jury trial at which the jury would determine a more fully  
6 developed version of the arbitrary or capricious or  
7 unreasonable standard and apply that to Darmouth's action?

8 MR. WATTS: Yes. And also a number of the  
9 statements that were made, for instance, by Dr. Finlayson,  
10 which are essentially either leading or were asked as  
11 leading questions or were expert opinions or something, will  
12 probably be excluded. And we certainly will move to exclude  
13 them.

14 THE COURT: Oh, yeah. We don't have to get into  
15 the details. But that's fundamentally where you are. And  
16 does it make a difference whether these people were acting  
17 in tort or acting in contract?

18 It's always inconvenient when people don't tell us  
19 which area of law they are moving in.

20 MR. WATTS: Well, our claims, our three claims  
21 encompass all three of, those two theories that you -- and I  
22 can go through it if you'd like. The --

23 THE COURT: I just wondered what the practical  
24 consequences are. It is like the scope of damages or what  
25 difference does it make?

1 MR. WATTS: It does go to damages, yes, I think.  
2 And it gives the jury an opportunity to evaluate what the  
3 contractual relationship was between the parties here and  
4 how the AMA Guidelines and the professional guidelines  
5 impact. And then, lastly, with the covenant, Dartmouth's  
6 conduct, Dartmouth's conduct in not investigating the matter  
7 fully and in firing her before she has an opportunity to  
8 make any sort of a protest and ignoring Dr. Knapik's stellar  
9 record in the organization, etcetera, etcetera.

10 So I think the final point is that they have made  
11 the point or tried to make the point that we didn't plead a  
12 due process claim. We're not here to plead or ask the Court  
13 to evaluate constitutional due process.

14 What we are here to ask, and it's in our pleadings  
15 and our complaint, and even under, even if it didn't say,  
16 arbitrary and capricious on that other point, or if it  
17 didn't say procedural due process, we're working in a notice  
18 pleading state here, you know.

19 And so if the facts that are portrayed in the  
20 complaint add up to failure of due process it's a due  
21 process claim. And we have made the point very clearly in  
22 the pleadings that they gave her no due process. They fired  
23 her without any of their own procedures being followed.

24 THE COURT: Right. But you are not making a due  
25 process claim? You are making a private claim, either in



1 contract or in tort?

2 MR. WATTS: Correct.

3 THE COURT: And there's a third theory, you'll  
4 remind me?

5 MR. WATTS: I'm sorry?

6 THE COURT: There's a third theory, a third legal  
7 theory?

8 MR. WATTS: Well, the third theory is the covenant  
9 which is a tort based, not a contract.

10 THE COURT: Okay. Okay. But no claim that they  
11 are a state act or --

12 MR. WATTS: No. No. No. Even though there was  
13 some reference in the pleadings on the other side that said  
14 private hospitals are not held to the same standard. That  
15 has been de-batched by New Hampshire case law and other  
16 states too where private hospitals are supported by public  
17 funds, etcetera, that they have to live by the same  
18 standards as public hospitals.

19 We're not saying it is a state actor. And I think  
20 the case law specifically says it's not a state actor, but  
21 it is held to a certain standard.

22 The other point was that the defense is claiming  
23 that the Court should defer to the institution as an  
24 academic institution. We've already addressed the point  
25 that it was not an academic decision, as they admitted. But

1 also in the Bricker case, which is one that they cited, and  
2 the whole line of cases that came after that, the courts  
3 have said that there is no deference if there's a hint or  
4 suspicion of foul play of any kind or procedural  
5 irregularities, that sort of thing, taking advantage of the  
6 situation.

7 And we, I think, portrayed that that has been the  
8 case here. So the idea of deference to the institution is  
9 not in the mix here at all.

10 THE COURT: All right. And then before I lose  
11 you, are you on the side of this being academic or  
12 disciplinary?

13 MR. WATTS: Well, that's a good question. It was  
14 not academic. The institution says it wasn't academic. So  
15 we have to abide by that.

16 THE COURT: That's your view? Do you see it as a  
17 disciplinary action?

18 MR. WATTS: Yeah, it appears to be a disciplinary  
19 action. Yes.

20 THE COURT: And does it make a difference? I  
21 mean, I sort of see them as a continuum, right? I mean on  
22 the academic side on the left the extreme case would be some  
23 poor soul that just couldn't master the material. And the  
24 disciplinary side on the right would be somebody that  
25 commits a felony outside of a hospital. And then there are

1 all kinds of behaviors in between that have academic and  
2 disciplinary mixed in such as plagiarism or cheating of  
3 different sorts.

4 MR. WATTS: Ethical issues.

5 THE COURT: What's that?

6 MR. WATTS: Ethical issues.

7 THE COURT: Ethical issues, yeah. That have both  
8 qualities. But I guess my real question to you is does it  
9 matter for this case which of those poles we locate the  
10 hospital's action under?

11 MR. WATTS: It only matters if the Court is  
12 inclined to defer to the institution's decision making.

13 THE COURT: Right. And then less deference for  
14 the disciplinary?

15 MR. WATTS: Yes. Yes.

16 THE COURT: Because it looks more like the  
17 expulsion of a student from high school or something like  
18 that?

19 MR. WATTS: Correct.

20 THE COURT: All right. That's helpful. Thanks.

21 MR. WATTS: Thank you.

22 MR. PANDOLPH: Briefly, may I?

23 THE COURT: Please.

24 MR. PANDOLPH: In terms of the latter point,  
25 again, the only issue between, in the case law between

1 disciplinary and academic dismissals is the amount of due  
2 process. It has nothing to do with the substantive review  
3 of a decision.

4 To say there's no deference, but then to argue on  
5 the other hand the arbitrary and capricious and  
6 reasonableness, which is the same thing by the way, applies  
7 doesn't make any sense.

8 THE COURT: So on the disciplinary side you what,  
9 get more notice? The pure disciplinary case, which is  
10 someone who is getting kicked out because of domestic abuse  
11 outside of the hospital?

12 MR. PANDOLPH: Step back again. This is  
13 constitutional law. But, yes, some courts have said you  
14 can't even review an academic decision. But in terms of  
15 discipline the Supreme Court has said, well, at least you  
16 should tell them notice of what they did and give them an  
17 opportunity to tell their side of the story. Not an  
18 evidentiary hearing.

19 THE COURT: Probably let them bring a lawyer into  
20 the room too.

21 MR. PANDOLPH: No, that's not -- I don't think the  
22 Supreme Court's decisions says that at all. The cases we  
23 cited nobody says that a lawyer has to be present during  
24 that, during that, during those meetings.

25 And the second point is, you know, you call it due

1 process in terms of a constitutional sense, but I'm talking  
2 about even procedural due process claim, even if it's based  
3 on contract you can review the complaint. There's no,  
4 there's no allegation that she didn't receive due process, a  
5 procedural due process. All the allegations are about is  
6 that she was dismissed and substantively that was an  
7 incorrect or unjust decision.

8 THE COURT: Substantively unfair.

9 MR. PANDOLPH: Right.

10 THE COURT: I think the two of you, it took a  
11 little doing, but I think the two of you agree on that.

12 MR. PANDOLPH: The other thing is, I'll briefly go  
13 over these points, we did plead as an affirmative defense in  
14 our response to the amended complaint.

15 THE COURT: Oh, exhaustion thing?

16 MR. PANDOLPH: Failure to exhaust. Okay. That's  
17 there. You can see that.

18 THE COURT: It was probably right after Latchis  
19 and before --

20 MR. PANDOLPH: I think we said it a couple of  
21 ways.

22 THE COURT: Right.

23 MR. PANDOLPH: Dr. Kispert didn't say that the  
24 decision was irrevocable. That's not in evidence. You'll  
25 have the stuff in front of you. That's just a misstatement.

1 THE COURT: What did he say?

2 MR. PANDOLPH: He didn't -- there's no evidence  
3 that he said anything. They haven't -- this is the letter.  
4 The letter tells her she's dismissed from the program and  
5 that you have a grievance procedure and process.

6 That's the same thing they did in the other case  
7 that counsel represented another medical resident. She got  
8 the same kind of letter that said she was dismissed from the  
9 program, went through the grievance hearing. That's nothing  
10 unique about --

11 THE COURT: I may be losing, I thought I had the  
12 facts down, but I obviously don't. I thought there was a  
13 discussion between Dr. Knapik and Dr. Kispert.

14 MR. PANDOLPH: Kispert. There's no -- we looked.  
15 There's nothing in his deposition about that.

16 THE COURT: It's my mistake. I thought she had  
17 spoken to somebody after she got word that she was going to  
18 not graduate.

19 MR. PANDOLPH: Oh, for sure she did. She spoke to  
20 somebody on the 1st, the day that they went out to her  
21 house.

22 THE COURT: Right.

23 MR. PANDOLPH: She, you know, this is -- she  
24 didn't get a chance, she never got to explain. She sent an  
25 e-mail and she explained how she got the letter. She

1 claims, oh, wait, she never claimed that Dr. Doe gave her  
2 the letter. She said it was e-mailed to her. You can  
3 check, it's right in the docket. She said it was e-mailed  
4 to me by Dr. Doe. And we have that issue.

5 Then she had a meeting with representatives of the  
6 residency program. They told her, geese, we're not much  
7 concerned about how you got the letter but what you did with  
8 it. As you note, frankly, she did worse than possible with  
9 the letter.

10 And then -- so that's -- she did come in for a  
11 meeting. And she had a meeting with representatives of the  
12 residency program. She explained her side of the story.  
13 But let's step back. She admitted doing it. This is not a  
14 place where you have to investigate she denies doing it.  
15 She admitted what she did and what -- she admitted the facts  
16 that formed the basis of a decision to dismiss her from the  
17 program.

18 And the question is, is that a reasonable decision  
19 by the residency program. Is that not an exercise of  
20 professional judgment that's entitled to deference by this  
21 Court and not for a jury to second guess a residency  
22 program's determination about academic standards, including  
23 professionalism and ethical standards that need to be  
24 applied to residents that they train.

25 They made a decision that that conduct, they no

1 longer wanted to associate with that kind of a person  
2 because they didn't think that conduct professional conduct  
3 and conduct becoming of a physician. Simply. That's it.

4 Now, in terms of futility, back to the exhaustion  
5 question, whatever, you know, possibly could a resident have  
6 been confused by this letter that's saying, well, maybe I  
7 don't have the right to appeal, maybe it's irrevocable.  
8 Possibly.

9 This resident was not so confused. That is an  
10 after the fact argument that's inconsistent with her  
11 deposition testimony where she said, she was not going to go  
12 for a hearing. I knew I had the right to it, I'm not going  
13 to do it. Or whether it's because she didn't lack counsel  
14 or whether because -- it's not futile because you think, and  
15 the New Hampshire Courts, we've cited cases, it's not futile  
16 merely because you think I don't think the outcome is going  
17 to change.

18 Now, I don't know how you can say that when you  
19 don't, the committee hasn't even been formed. And the  
20 committee is to include people that you didn't work with.  
21 It's to include other residents. How you can sit there and  
22 say, I don't think it's going to change its mind, if I have  
23 an evidentiary hearing and present whatever I present,  
24 that's not futility. That's not futility.

25 THE COURT: I mean, I wondered myself if she had



1 thrown herself on the carpet and begged for mercy whether  
2 the outcome would have been different. We'll never know.

3 MR. PANDOLPH: Well, that was another factor. She  
4 showed no remorse. You see that in the letter. They said,  
5 she never said, you know, well, let's step back. By her own  
6 admission in 2011 she knows from Dr. Doe's mother that  
7 Dr. Finlayson said, you're wrong, this was not probation,  
8 you don't have to disclose it to the fellowship program.  
9 You are wrong.

10 A year later she decides, without doing anything  
11 else, that, oh, I disagree with that, and I'm going to send  
12 the letter and not discuss it with anyone from the residency  
13 program.

14 And, by the way, it was not anonymous. Okay. It  
15 was sent in a Dartmouth Hitchcock envelope with Dartmouth  
16 Hitchcock postage. It was meant to be -- it was designed to  
17 be like it came from the program. Okay.

18 And she says, well, she's supposed to report to  
19 the board that was lied to. Well, that -- if it involves a  
20 medical license application that has nothing to do with the  
21 fellowship program. What's the fellowship program supposed  
22 to say? Gee, I got this letter in the mail, that must mean  
23 that somebody is trying to report that Dr. Doe lied on her  
24 application for a medical license. I mean, come on, it  
25 strains credibility in that regard.

1           So she didn't do anything. She knew. And, as I  
2       said before, the actions were unprofessional. And a  
3       reasonable residency program could have made that  
4       determination.

5           THE COURT: I'll have to give it some thought. I  
6       appreciate it. Which depositions, you know, you guys have  
7       been good about sending in only the pieces of the  
8       depositions, which was helpful in the first round. But then  
9       you sort of wonder what happened before and what happened  
10      after.

11          Can I get the transcripts of the, I don't need all  
12      the depositions that you've taken in the case, but those  
13      that have been submitted in part? It's a lot easier to read  
14      the run up and read the thing in context.

15          MR. PANDOLPH: How do you prefer to -- you can  
16      have them four on a page, you prefer the whole one single  
17      page? How do you prefer?

18          THE COURT: A scrunch is fine.

19          MR. PANDOLPH: Sure. We'll take responsibility  
20      for that.

21          THE COURT: Yeah. Is that all right with the  
22      plaintiff's side? I don't know if you had attached copies  
23      of portions or not.

24          MR. WATTS: I'm sorry, I missed that.

25          THE COURT: Would you mind submitting the full

1 transcript for the depositions that are attached in part?  
2 It's just hard to kind of read six pages and then it all  
3 cuts off.

4 MR. WATTS: That's fine. I would ask if, if we  
5 shouldn't redact them?

6 THE COURT: What's that?

7 MR. WATTS: We should redact them for Dr. Doe's,  
8 where Dr. Doe's name is mentioned?

9 THE COURT: Oh, is it going to be voluminous?  
10 File them under seal. I can return them.

11 MR. WATTS: The first few depositions --

12 THE COURT: It's not that hard?

13 MR. WATTS: No, we've already --

14 THE COURT: Well, let's redact them. That will  
15 make --

16 MR. PANDOLPH: We can do that.

17 THE COURT: Mr. Ellis is nodding and make him  
18 pleased. And that's only fair, yeah. Good. All right.  
19 Good. Thank you both. I appreciate it.

20 (The Court recessed at 2:42 p.m.)

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## C E R T I F I C A T E

I, Anne Marie Henry, Official Court Reporter for the United States District Court, for the District of Vermont, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

A handwritten signature in cursive script that reads "Anne Marie Henry". The signature is written in black ink and is positioned above a horizontal line.

Anne Marie Henry, RPR  
Official Court Reporter